89-388

No. 88-

IN THE

Supreme Court of the United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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(7903)

Questions Presented

After finding that the loss of the 52,000 units of single room occupancy ("SRO") housing that still exist in New York City would substantially contribute to homelessness, the New York City Council enacted an emergency statute. The law imposes a five year ban on demolition or conversion of single room occupancy housing and a five year ban on the warehousing of vacant rooms. It also contains a hardship provision which ensures that owners will make a reasonable rate of return on their property. The following questions are presented:

1. Does the statute result in a physical occupation of the subject properties violative of the Taking Clause of the Fifth Amendment?

2. Is the statute invalid on its face as a regulatory taking of property?

Parties

Petitioners, the defendants below, are the City of New York, Edward I. Koch in his capacity as Mayor of the City of New York, Abraham Biderman in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York[1] and Charles Smith in his capacity as Commissioner of the Department of Buildings of the City of New York.

Also petitioners, but not joining this petition for certiorari, are the Coalition for the Homeless and five individuals, Richard Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo and Nicholas Tallerico, who are tenants in two of the SRO buildings owned by plaintiff Seawall Associates. The Coalition and the five tenants intervened as defendants below.

Respondents, plaintiffs below, are Seawall Associates, 459 West 43rd Street Corporation, Eastern Pork Products Company, Durst Partners, Sutton East Associates—86, Channel Club and Anbe Realty Co.

1Former Commissioner Paul Crotty was originally named in the caption.

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Petition for a Writ of Certiorari to the New York State Court of Appeals

The petitioners, the City of New York, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the New York State Court of Appeals entered on July 6, 1989 which declared unconstitutional a statute enacted by the New York City Council.

Opinions Below

The opinion of the New York State Court of Appeals has not yet been reported. It is reprinted in the Appendix at page A-1. The opinion of the New York State Supreme Court, Appellate Division, First Department is reported at 142 A.D.2d 72, 534 N.Y.S.2d 958. A copy is reprinted in the Appendix at page A-107. The New York State Supreme Court opinion is reported at 138 Misc.2d 96, 523 N.Y.S.2d 353. A copy is reprinted in the Appendix at page A-165.

Jurisdiction

The judgment of the New York State Court of Appeals declaring New York City's Local Law 9 unconstitutional on the ground that it takes property without compensation in violation of the Fifth Amendment was entered on July 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

Statutory Provisions

Local Law 9 is codified in New York City Administrative Code §§ 27-198.2, 27-198.3, 27-2150-53. The law is printed in the Appendix at page A-253.

Statement of the Case

(1)

This appeal raises the question whether New York City's Local Law 9, which bars demolition or conversion of single room occupancy ("SRO")[1] housing and forbids the warehousing of vacant units for a five year period, constitutes a taking on its face under the Fifth Amendment. Local Law 9 was enacted after the New York City Council found that the loss of SRO housing constituted "a serious public emergency" (42).[2]

SRO's have long provided inexpensive housing for New York City residents on the fringe of society. SRO tenants are poor. Those who work full time have a median income

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[1]SRO's are living units without a private bathroom or kitchen (176).

[2]Numbers in parentheses refer to the Record on Appeal filed in the Court of Appeals. Numbers preceded by "SR" refer to the Supplemental Record in the Court of Appeals. Numbers preceded by "A" refer to the Appendix to the Petition for Certiorari.

of $14,000. One third of SRO tenants receive public assistance or disability benefits (177). Many have other problems fending for themselves. Almost 30% are over 60 years old (177). Over 11% have been hospitalized for mental illness (SR 594).

SRO's have been developed in New York City since the turn of the century. Landlords have found them a profitable way to break up larger units and earn more rent from the same space. They used SRO's to attract poor tenants who could not afford better housing (684-85).

The number of SRO's has declined significantly since 1960 due to the rise in value of New York City real estate (692). Many landlords neglected their buildings and harassed tenants to force them to move so that the buildings could be razed or converted to other uses (221, 668). City policy reflected the belief that SRO's should be discouraged as substandard housing (177). By 1986, only 52,000 SRO units remained in New York City (447).

City policy changed in the 1980's to recognize that SRO's are a vital and irreplaceable part of the housing stock. The City acted to preserve SRO's because many of the former SRO tenants became homeless. New York City is facing a homeless crisis; the City takes in more homeless people at its public shelters than at any time since the Great Depression (178-79). More than one-third of the people living in New York City shelters for the homeless last lived in an SRO (200).

In 1985, the New York City Council determined that a "serious public emergency" existed caused by the loss of SRO's. It enacted the first of three laws barring destruction or alteration of SRO's and commissioned a study of SRO housing. The second law added a ban on warehousing

vacant units because many owners were keeping units vacant in anticipation of a future conversion or demolition (178). The vacancy rate for SRO's, 12%, stood in sharp contrast to the 2% vacancy rate for residential apartment buildings (178).

The SRO study ("the Blackburn Report") recommended a major effort by the City to preserve SRO housing (647). The Blackburn Report's 140 pages detail the history of SRO's in New York City, analyze the need for SRO housing and the current condition of SRO owners and tenants, and contain extensive recommendations for preservation of SRO's. In response, the City Council enacted Local Law 9. The law was based on findings of fact by the City Council (A-315-17):

> The Council finds and declares that a serious public emergency . . . has been created by the loss of single room occupancy dwelling units housing lower income persons; . . . that there is evidence to conclude that the ordinary operation of the real estate market in this city will result in further reduction of such units and that units which have been lost will not be replaced; that many of the occupants who have been or will be displaced . . . are elderly and infirm persons of low income . . . that a considerable number of such persons have become a part of a growing homeless population and that, absent legislative intervention in this process, others will follow.

(2)

Local Law 9

Local Law 9 preserves SRO housing while allowing owners to put their SRO's to other uses, as long as the lost

units will be replaced. The law establishes a five year moratorium on demolition or conversion of most SRO units. Admin. Code §27-198.2[a], [c]. SRO's subject to the law may not be warehoused; owners must make all SRO's habitable and rent them to bona fide tenants. Admin. Code §27-2151[a]. These provisions carry civil penalties. Admin. Code §27-198.2[g], §27-2152.

The law establishes three ways for owners who would otherwise be subject to the law to demolish or convert their buildings and avoid the anti-warehousing provisions. Owners may be eligible for a complete or partial hardship exemption, they may buy out their units or they may replace their units.

The hardship provision, Admin. Code §27-198.2[d][4] (b), was copied from the New York rent control law. It applies if "there is no reasonable possibility" owners will make "a reasonable rate of return" on their property. Reasonable rate of return is defined as 8 1/2% of the building's assessed value as an SRO. Owners who qualify under the hardship provision and wish to destroy or convert their buildings may do so with a complete or partial exemption from the buy out or replacement provisions.

The replacement provision, Admin. Code §27-198.2[d][4](a)(ii), allows owners to obtain a permit to demolish or convert SRO units if they create new units. The replacement units would be owned or operated by a not-for-profit corporation.

As an alternative, owners can pay $45,000 a unit to the SRO housing development fund company. Admin. Code §§27-198.2[d][4](a)(i), 27-198.2[h]. The money will be used to preserve, acquire and develop low and moderate

income housing (182). $45,000 represents the cost of acquiring and rehabilitating an existing SRO unit (182).

Tenants whose buildings may be converted or demolished are protected by the law. If a building is more than 50% occupied, replacement housing must be created. In this way, even a temporary reduction in the housing stock can be avoided. The law also requires owners seeking a replacement or buy out exemption to offer their tenants an opportunity to relocate to a comparable unit at a comparable rent in the same borough. Admin. Code §27-198.3.

(3)

Proceedings Before the Trial Court

In *Seawall Associates v. City of New York,* the plaintiffs sought a preliminary injunction against enforcement of Local Law 9. They argued, among other things, that Local Law 9 was invalid as a taking under the Fifth Amendment (17-34).

Without notice to the parties, the trial court converted the motion for a preliminary injunction into a motion for summary judgment (A-182). The Court granted the plaintiffs summary judgment, declared Local Law 9 invalid and enjoined enforcement of the law (A-250-51).

The Court reasoned that the law effected a taking because it diminished the value of SRO properties (A-243). The Court also held that the anti-warehousing provisions denied plaintiffs due process because they destroyed the properties' economic value (A-219-20, SR 542).

(4)

The Appellate Division Decision

Citing the principles set forth by this Court in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 420 (1987); *Agins v. Tiburon,* 442 U.S. 255 (1980); and *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the Appellate Division unanimously declared Local Law 9 constitutional in its entirety (A-158). The Court found that the law substantially advanced a legitimate state interest in preventing SRO tenants from becoming homeless (A-143-44, 152). The Court referred to the Blackburn Report, which had recommended that the City preserve SRO's because SRO's house a predominantly poor population, who are frequently elderly and mentally or physically handicapped with limited incomes (A-152). The Appellate Division also upheld the validity of the anti-warehousing provision of the law because it is "designed to meet an immediate and pressing exigency" even if its effect will be to require that a property owner remain in the housing business (A-155).

The Court found that Local Law 9 did not deny plaintiffs economically viable use of their property because its hardship provision ensures that their properties retain value. The Court held that the law did not work a taking merely because it restricted owners from making the most profitable use of their property (A-149-51).

(5)

The Court of Appeals Decision

The Court of Appeals reversed, declaring Local Law 9 unconstitutional on the ground that it takes property in violation of the Fifth Amendment. Focusing on the anti-warehousing provision, the Court found, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that the law constituted a physical taking of property because it deprived owners of the right to exclude others (A-13-14). In so holding, the Court noted that "the Supreme Court has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a *per se* physical taking" (A-21). The Court distinguished decisions of the Supreme Court and the New York Court of Appeals which have consistently upheld rent control statutes on the ground that the decisions do not involve forcing property owners to rent their properties to strangers (A-23-26).

The Court stated that the law also effected a regulatory taking. The Court found that the law deprived owners of economically viable use of their property because it prohibited owners from redeveloping their properties (A-33-39). The Court also found that the law lacked a substantial relationship to the purpose of preventing homelessness (A-44-52).

In dissent, Judge Bellacosa and Chief Judge Wachtler criticized the majority for ignoring the fact that this was a facial challenge to the law. The dissent argued, relying on this Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), that a statute should not be struck down as facially unconstitutional although it may deprive some

owners of economically viable use of their property (A-84-86). It noted that (A-71-72):

> Research reveals no cases in which the Supreme Court or our Court have used the regulatory taking theory to undo a legislative act on a facial attack. Also, no precedents in the orbit of this case have previously ventured into the *per se* taking universe to declare a legislative act facially unconstitutional.

The dissent rejected the physical taking argument because the law was temporary and because it was similar to rent control in regulating the landlord-tenant relationship (A-91-92). The dissenters also rejected the regulatory taking theory. They would find that the law's hardship provision "guarantees a fair, minimum return" (A-98). The dissent reviewed the history of the City's policy toward SRO's and its effect on the stock of affordable housing (A-74-75). It found "self-evident" the established relationship between the law and its purpose of preventing more homelessness among SRO tenants (A-96-97):

> [P]reserving SRO housing stock and stanching the growing ranks of the City's shelter-less population is a legitimate governmental interest of the highest, most critical order. The SRO moratorium applies a tourniquet to the loss of this part of the City's housing stock and substantially advances the City Council's expressed legislative interest of preserving these sheltering units and avoiding a further spillage of homeless into the City's street population.

Reasons for Granting the Writ

This case raises important questions regarding a municipality's ability to regulate land use to halt the spread of homelessness among its poorer citizens without effecting a taking of property. As the dissent in the Court of Appeals pointedly noted, the majority's decision that New York City's Local Law 9 constitutes a physical taking is without precedent. On both the physical taking and regulatory taking grounds, the decision below is inconsistent with this Court's decisions on land use regulation. Finally, the Court of Appeals erred in sustaining a facial attack to the statute without having any facts in the record to support a conclusion that any property owner had been unfairly affected and had been unable to obtain relief under the statute's hardship provision.

This Court has jurisdiction to hear this case because, as is discussed *infra* at 22, the Court of Appeals majority did not not rest its decision on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). The majority opinion held, based on a misreading of federal constitutional law, that Local Law 9 constitutes a taking of property in violation of the Fifth Amendment.

1. The Majority's Extraordinary Extension Of The Physical Taking Doctrine To Include A Temporary Law Regulating The Landlord-Tenant Relationship Is Without Support In This Court's Cases.

The majority's application of the physical taking doctrine to a law regulating the landlord-tenant relationship is unprecedented. This Court has never found that a law that prevents landlords from excluding residential tenants from rental units constitutes a physical taking.

The majority below held that Local Law 9 effects a physical taking because the anti-warehousing provision, when applied to vacant units, requires creation of a tenancy (A-21). In so ruling, the Court of Appeals ignored this Court's repeated adherence to the rule that landlord-tenant regulations do not effect a taking *per se*. In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1989), this Court reaffirmed that such statutes are a proper exercise of the police powers:

> We stated in *Loretto v. Teleprompter Manhattan CATV Corp.* that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." And in *FCC v. Florida Power Corp.* we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." 108 S. Ct. at 857 n.6 (citations omitted).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), this Court held that a "permanent physical occupation" of land is *per se* a taking. This Court has declined, however, to find that laws regulating tenancies constitute a "permanent physical occupation." *See Pennell*, 108 S. Ct. at 857 n. 5 (1989) (challenge to rent control law as a physical taking rejected as not ripe). Indeed, this Court has repeatedly reaffirmed the validity of laws that restrict landlords' ability to determine whether their residential properties will be rented. *See Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding rent control); *Block v. Hirsh*, 256 U.S. 135 (1921) (same); *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed*, 464 U.S. 875 (1983) (upholding rent control statute that effectively eliminates right to evict

tenant); *Benson Realty Corp. v. Beame,* 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed,* 449 U.S. 1119 (1981) (same).

Under rent control, as with Local Law 9, owners lose their right to exclude others from their properties. Owners give up the right to eliminate an existing tenancy, even at the end of a lease, thus eliminating the owners' right to exclude the tenants from the building. *See, e.g., Benson v. Beame; Callahan v. Fresh Pond Shopping Center, Inc.*

Moreover, the practical effect of rent control is to require the creation of new tenancies when existing tenants die or move out. Landlords who cannot afford to maintain a building without rental income will not be able to obtain permission to raise rents for existing tenants if rentable units are vacant because the landlord chooses to keep them off the market. *See* New York City Administrative Code §26-511 [c] (6). Thus, rent control statutes require that properties be occupied without effecting a physical taking of the property.

Even if this Court had not established that laws regulating landlords and tenants do not constitute a taking, the anti-warehousing provisions would be constitutional. In *Loretto* this Court held that a law requiring owners to allow cable companies to install cable equipment on their rental buildings constituted a physical taking. Yet this Court carefully hypothesized and distinguished a law similar to Local Law 9. A law requiring landlords to install cable television for their tenants would not necessarily constitute a physical taking, this Court stated, even though the landlord would have to bring cable apparatus into the building. The fact that the landlord would own, select and install the cable was sufficient to take it out of the realm of a physical taking. *Loretto,* 458 U. S. at 440 n.19.

The anti-warehousing provision at issue here is similar to the law hypothesized in *Loretto*. The law does not appropriate the SRO units. It requires, instead, that owners rent out their units to any bona fide tenant. Because owners retain the right to choose their tenants, there is no physical taking. *See also Loretto v. Teleprompter CATV*, 53 N.Y.2d 124, 159 n.2, 423 N.E.2d 320, 338 n.2 (1981) (Cooke., C.J., dissenting).

The Court of Appeals' application of the doctrine of physical taking to Local Law 9 was also unwarranted because the law is not permanent. As this Court explained in *Loretto*, a physical taking is a permanent taking: "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Loretto*, 458 U. S. at 435 n.12.

Local Law 9 provides for a five year limit on its restrictions. The law can be extended for further five year periods only if the New York City Council finds that the "serious public emergency" that led to enactment of the law continues to exist (A-312 §7).

The Court of Appeals accepted that the law is temporary (A-27), but mistakenly read this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as holding that physical takings could be temporary. This expansion of the doctrine of physical taking is unwarranted.

In *First Lutheran Church*, this Court held that damages could be assessed if a regulatory taking occurred. This Court did not hold that a physical taking could be temporary. *First Lutheran Church* did not even involve a physical taking. 482 U.S. at 310. Thus, *First Lutheran Church* did not extend the notion of a temporary taking to a physical

taking which this Court has defined, in part, by the permanence of the physical occupation. *See Nollan v. California Coastal Commission,* 483 U.S. 825, 832 (1987); *Loretto,* 458 U.S. at 427-35.

Finally, the Court below had no basis for its holding that the provisions of Local Law 9 that bar demolition or conversion of SRO housing effect a physical occupation of property. In the absence of a physical entry, there cannot be a "physical occupation." *See Nollan,* 483 U.S. at 831-32; *Loretto,* 458 U.S. at 435-36; *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958).

In sum, the majority's application of the doctrine of physical taking to Local Law 9 had no basis in this Court's cases. Because the law is similar to rent control in regulating landlord-tenant relationships and because it is temporary in duration, it does not effect a physical taking.

2. The Majority Opinion Disregarded This Court's Standard For Determining When A Statute Effects A Regulatory Taking On Its Face.

To succeed in a facial challenge to a law's constitutionality, the plaintiffs must show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). The majority below ignored this standard and held that because some aspects of Local Law 9 are improper in some circumstances, the law is facially invalid. The majority's application of an overbreadth analysis has no basis in takings cases.

Moreover, the majority ignored this Court's warning that facial takings challenges are especially disfavored. *See Pennell,* 108 S. Ct. at 856-57; *Keystone Bituminous Coal Ass'n*

v. DeBenedictis, 480 U.S. 470, 494 (1987). In *Pennell* this Court explained:

> Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary" (citations omitted) 108 S. Ct. at 856.

The Court of Appeals deemed Local Law 9 improper in all circumstances without ever engaging in the "essentially *ad hoc* factual inquiry" that determines a takings analysis.

This Court has held that a statute "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone*, 480 U.S. at 485. Local Law 9 satisfies these tests on its face.

Local Law 9 contains a hardship standard that ensures the properties it regulates remain economically viable. The law provides that if owners cannot earn 8 1/2% on their buildings' assessed value as an SRO, they are exempted from all portions of the law, including the anti-warehousing provisions. Administrative Code §§27-198.2[d][4](b), 27-2151[b][3]. The hardship standard ensures that all regulated properties have at least one economically productive use—the use they have always been put to as an SRO. This hardship standard was derived from the New York rent control law, which has been sustained against constitutional challenge. *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

If an SRO owner anticipates that the law will eliminate his or her property's economic viability, the owner may apply for a hardship exemption, just as an owner may apply for hardship relief from a myriad of land use restrictions including zoning regulations, rent control and New York City's Landmarks Law. Owners dissatisfied with the administrative process may challenge the law as applied to their property. A reviewing court can then analyze the owner's "reasonable investment backed expectations" and perform the "essentially *ad hoc* factual" inquiry into such factors as how much an owner paid for the property and with what expectations. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).[3]

This Court has never held, however, that a law may be struck down as facially invalid because it may effect a taking as applied to some owners. To the contrary, as long as it is constitutional to apply the law to some owners, the law is facially valid. *See Salerno*, 481 U. S. at 745. Thus, for example, in *Keystone* this Court needed to look no further than the plaintiffs' own properties to determine that the law did not deprive all owners of economically viable use of their property. 480 U.S. at 496.

Instead of analyzing whether regulated SRO's retain economic value, the majority struck down the law because it depresses the value of SRO's (A-36). It is well established

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[3]If plaintiffs challenged the law as applied to them, petitioners could dispute the majority's view that Local Law 9 effects a taking as applied to owners who intend to develop their property (A-30). For instance, Seawall plans to assemble a city block in midtown Manhattan to build an office building (276). Because the trial court granted summary judgment without notice, petitioners never had the opportunity to offer evidence tending to show that Seawall's property will retain economic value, and indeed Seawall will still be able to make a profit, after complying with the law's replacement or buy out provisions.

that a mere diminution in the value of property is insufficient to prove a taking. *Penn Central*, 438 U.S. at 131; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution in value). Instead, the issue is whether SRO properties retain economic viability, a question that can best be resolved in a challenge to the law as applied to particular properties. *See Pennell*, 108 S.Ct. at 856.

The majority's misconception of this Court's standard for determining whether a statute effects a taking is exemplified by its decision to analyze whether the hardship provision saves a statute it had already determined to be unconstitutional (A-53). In performing a taking analysis, this Court has always analyzed statutes as a whole. For instance, in *Penn Central* this Court considered the availability of hardship relief as part of determining whether the Landmarks Law left the regulated property economically viable. 438 U.S. at 136-38 This Court has never analyzed a law by isolating particular requirements, determining whether they effect a taking and then asking whether the taking had been sufficiently mitigated by another provision. The majority's approach is inconsistent with this Court's takings cases.

3. The Majority Opinion Ignored This Court's Decisions That Have Upheld Land Use Regulations Similar To Local Law 9.

The majority held that the law denied owners economically viable use of their property because it eliminates the right to develop SRO's (A-35). This was factually inaccurate; the law's replacement and buy out provisions enable owners to develop their properties while alleviating the harm their development does to the people of New York City.

Even if the law banned development, however, it would not mean that Local Law 9 effects a taking. A law may limit how property is used without taking property. *See Keystone*, 480 U.S. at 491 (ban on mining coal support estate); *Goldblatt v. Hempstead*, 369 U. S. 590, 592 (1962) (ban on using gravel pit as quarry). Indeed, ordinary zoning would hardly be possible if this were not the case. Land zoned for single family homes may not be developed for other uses. It has been settled as long ago as *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that this type of development ban does not effect a taking, even if the owner had bought the land with the intention of putting it to a more lucrative use.

This Court reaffirmed in *Nollan v. California Coastal Comm'n* that as long as a land use regulation substantially advances a legitimate state interest, owners may be barred from changing the use of their property. 483 U.S. at 835-37. Thus, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130.

The majority's theory that because Local Law 9 imposes an affirmative duty it effects a taking (A-58), also ignores this Court's decisions. The Landmarks Law at issue in *Penn Central* imposes the affirmative duty on owners to keep their building "in good repair." *See Penn Central*, 438 U. S. at 111-12. Moreover, laws governing the landlord-tenant relationship frequently impose affirmative duties on property owners. As this Court stated in *Loretto*, such laws do not effect a taking merely because they impose particular requirements. 458 U. S. at 440.

The majority relied on this Court's observation that the Takings Clause was "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U. S. 40, 49 (1960) (A-60). But a takings analysis does not merely compare the regulated group to some other group. The narrowness of the burdened class is not enough to establish a violation of theTakings Clause: "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received." *Keystone,* 480 U.S. at 491 n.21.

In *Penn Central* this Court rejected the rationale relied on by the Court of Appeals. "It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Central,* 438 U.S. at 133.

As long as owners benefit under the law, they have not been singled out. In *Penn Central,* this Court accepted the City Council's judgment that the owners of 400 official landmarks, out of the over one million buildings in New York City, would benefit because the law "benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . ." *Penn Central,* 438 U. S. at 134.

SRO owners are similarly benefited as New Yorkers by Local Law 9. The City Council has made a judgment that the law will help everyone in New York City by halting the growth of a "serious public emergency" caused by the loss of SRO housing. By ending the increase in homelessness attributable to the loss of SRO's, the law will improve "the quality of life in the city as a whole." *Penn Central,* 438 U. S. at 134.

4. The Majority Opinion Disregarded The Considered Legislative Judgment That Local Law 9 Is Necessary To Prevent Homelessness And To Put Available Housing To Use.

The majority's analysis of the purpose of the law was similarly deficient. In *Nollan* this Court held that a land use regulation must "substantially advance" a "legitimate state interest." 483 U.S. at 834. Local Law 9 satisfies this standard.

Local Law 9 was enacted after the Blackburn study confirmed that it was necessary to solve a "serious public emergency" (A-315). The majority below ignored the Council's stated reasons for its actions and substituted its judgment of the law's utility for that of the legislative body. This judicial legislation was improper.

The City Council's statement of legislative findings details two purposes. For the 88% of SRO's that are occupied (178), the purpose of the law is to prevent current SRO tenants from becoming homeless (A-316). For the 12% of vacant SRO units, the purpose of the law is to ensure that solely needed housing is made available (149). The replacement and buy out provisions allow owners to put their properties to other uses, as long as they mitigate the harm caused to the public by their destruction of SRO housing.

The law substantially advances both legitimate state interests in preservation of SRO housing. The ban on warehousing, demolishing or converting SRO's will save current tenants from homelessness. Through bitter experience, New York City has learned that when owners empty SRO's in order to redevelop their properties, many of the former tenants end up without a home (177-78). SRO tenants are poor; many are elderly, many are mentally ill

(177, SR 594). Even if owners use legal means to empty their buildings, SRO tenants have proven incapable of resisting their landlords' pressure to move and, once they have left their homes, incapable of finding another.

The five year ban on demolition or conversion of SRO housing helps preserve the buildings. The five year ban on warehousing vacant units ensures that landlords will not empty their buildings and wait out the moratorium, thus subverting the purpose of the law.

The majority opined that rent control was sufficient to protect existing SRO tenants (A-48). Local Law 9 was enacted because the City Council found that rent control was insufficient to protect SRO tenants from homelessness (A-316-17). This Court has recognized that the rise of homelessness justifies measures that go beyond traditional rent control to serve rent control's purpose of making affordable housing available. Thus, in *Pennell* this Court upheld a statute that set rents in part by reference to the tenant's ability to pay. The law was proper, this Court stated, because "[p]articularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe." 108 S. Ct. 859 n.8. In enacting Local Law 9, the New York City Council was all too aware of the severe social costs of dislocating SRO tenants. Local Law 9 ensures that SRO tenants will not be added to the ranks of the homeless.

The majority was also wrong when it held that the ban on warehousing currently vacant units does not further the law's purpose (A-49). As the City Council stated, this aspect of the law will "maintain the availability of single room occupancy dwelling units for low income persons during the serious public emergency [caused by the loss of SRO housing]" (149). Further, when anti-warehousing is

applied to partially occupied buildings, it protects existing tenancies by ensuring the building remains viable as housing. Thus, anti-warehousing as applied to vacant units substantially advances the Council's two purposes of making a vital resource available and protecting existing SRO tenants. The second guessing of the Council by the majority below was unjustified and has no support in this Court's decisions.

5. This Court Has Jurisdiction To Hear This Case.

The Court of Appeals' decision does not rest on an adequate and independent state ground. In *Michigan v. Long* this Court held:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. 463 U.S. at 1040-1041.

The *Michigan v. Long* holding is implicated in the case at bar. The Court of Appeals' decision is based on an extensive analysis of the federal constitutional law of takings as developed in this Court's decisions. The Court of Appeals refers to a state constitutional ground only in three instances and only in conjunction with the federal constitution (A-3, 12, 63).

Furthermore, the Court of Appeals did not include a "plain statement" that federal law did not compel its result. *See Michigan v. Long*, 463 U. S. at 1041; *New York v. Class*,

475 U. S. 106, 109-110 (1986). Indeed, the Court below expressly stated that it would not reach the question of whether the state constitution's takings clause differed from that of the federal constitution: "In view of this holding, we need not decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution" (A-63 n. 15). Thus, the Court below rested its decision on its interpretation of the federal takings clause. Therefore, this Court has jurisdiction to hear this appeal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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